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IN THE

Supreme Court of the United States

October Term, 1956

No. .....

F. P. NEWPORT,

Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., *et al.*,

Respondents.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

To the Honorable Chief Justice Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent, Paul W. Sampsell, as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., presents his brief in opposition to the petition of F. P. Newport for a writ of certiorari herein, and in support of an order denying said writ.

Reasons for Denying the Writ.

Pursuant to the provisions of Supreme Court Rule 24, Respondent hereby designates the following matters and grounds why the cause should not be reviewed by the Supreme Court of the United States:

1. The United States Court of Appeals, Ninth Circuit, has not rendered a decision in conflict with the decision of another court of appeals in the same matter. (See S. Ct. Rule 19, 1(b).)
2. The United States Court of Appeals, Ninth Circuit, has not decided an important state or territorial question in a way in conflict with applicable state or territorial law. (See S. Ct. Rule 19, 1(b).)
3. The United States Court of Appeals, Ninth Circuit, has not decided an important question of federal law, which has not been, but should be, settled by the Supreme Court of the United States. (See S. Ct. Rule 19, 1(b).)
4. The United States Court of Appeals, Ninth Circuit, has not decided a federal question in a way in conflict with the applicable decisions of the Supreme Court of the United States. (See S. Ct. Rule 19, 1(b).)
5. The United States Court of Appeals, Ninth Circuit, has not so far departed from the accepted and usual course of judicial proceedings, nor so far sanctioned such departure by a lower court, as to call for an exercise of the power of supervision vested in the Supreme Court of the United States. (See S. Ct. Rule 19, 1(b).)

6. Petitioner has failed to present with accuracy, brevity and clearness facts essential to a ready and adequate understanding of the points which petitioner claims require the consideration of the Supreme Court of the United States. (See S. Ct. Rule 23, par. 4.)

7. That many of the purported facts stated in the petition for writ of certiorari herein are inaccurate and misleading, and do not serve to give to the Supreme Court of the United States "whatever is essential to a ready and adequate understanding of the points which petitioner claims require consideration by this court." (See S. Ct. Rule 23, par. 4.)

8. The petition for writ of certiorari does not (as required by S. Ct. Rule 23, par. (i)) have appended thereto (1) the referee's findings of fact, conclusions of law and order filed November 15, 1955, dismissing with prejudice the claim of F. P. Newport for fees [R. p. 63], (2) the referee's certificate on review dated December 6, 1955 [R. p. 72], (3) the Memorandum Opinion of the Honorable Leon R. Yankwich, Chief Judge of the District Court, on review, dated December 23, 1955 [R. p. 83], (4) the decision of the Honorable Leon R. Yankwich on review dated December 23, 1955 [R. p. 94], and (5) the order of Chief Judge Yankwich affirming the order of the referee dismissing with prejudice the petition of F. P. Newport for compensation for alleged services, dated December 27, 1955. [R. p. 95.]

Official and Unofficial Reports of the Opinions Delivered in the Courts Below Not Referred to in the Petition. (S. Ct. Rule 40, 1(a).)

Referee's Findings of Fact, Conclusions of Law and Order filed November 15, 1955, dismissing with prejudice the claim of F. P. Newport for fees. [R. p. 63.]

The Referee's certificate on review dated December 6, 1955. [R. p. 72.]

The Memorandum Opinion of the Honorable Leon R. Yankwich, Chief Judge of the District Court, on review, dated December 23, 1955. [R. p. 83.] (137 Fed. Supp. 58.)

The decision of the Honorable Leon R. Yankwich on review dated December 23, 1955. [R. p. 94.]

The order of Chief Judge Yankwich affirming the order of the Referee dismissing with prejudice the petition of F. P. Newport for compensation for alleged services, dated December 27, 1955. [R. p. 95.]

For the convenience of the Court the omitted documents listed above are printed in the appendix attached hereto.

Jurisdiction.

Jurisdiction is conferred by 11 U. S. C. A., Section 1, subsections 3 and 10 (Bankruptcy Act, Sec. 1, subsecs. 3 and 10); 11 U. S. C. A., Section 11 (Bankruptcy Act, Sec. 2); 11 U. S. C. A., Section 47 (Bankruptcy Act, Sec. 24, subsecs. a, b and c); 11 U. S. C. A., Section 66 (Bankruptcy Act, Sec. 38); General Orders in Bankruptcy Nos. 36 and 37.

Questions Presented for Review.

1. Did the order of Judge McCormick dated November 21, 1935, authorizing the Receiver to employ Mr. Newport, become *functus officio* upon appointment and qualification of the Trustee on March 19, 1937?

2. Was F. P. Newport entitled to any compensation in excess of $250 per month for "extraordinary" services claimed to have been performed by him between November 1, 1935, when he was first employed, and November 30, 1943, the date of his discharge?

3. Was F. P. Newport entitled to any compensation from the bankrupt estate for services claimed to have been performed subsequent to his discharge by the Trustee on November 30, 1943?

4. Were the "extraordinary" services claimed to have been performed by F. P. Newport voluntary, duplicate services which the Bankruptcy Act requires the Trustee to perform? Was he entitled to compensation for any such services from the bankrupt estate?

5. Is F. P. Newport estopped by his laches from asserting any claim for compensation and expenses from the bankrupt estate?

6. Is the Trustee in Bankruptcy estopped to deny the claim of F. P. Newport for compensation?

List of Documents.

The following is a list of documents contained in the record on file in the Supreme Court, together with the notations of the pages of the record where said documents may be found. Reference will be made in Respondent's Brief to these documents. This list is prepared for the convenience of the Court.

	Record File Page
Order of Judge Paul J. McCormick appointing H. F. Metcalf Receiver, dated March 25, 1935	2
Petition of Receiver Metcalf for order authorizing employment of Newport and fixing his salary [Newport's Ex. 1; Rep. Tr. p. 10, lines 7 and 8]	6
Order of Judge McCormick authorizing Receiver to employ Newport and fixing his salary, dated November 21, 1935 [Newport's Ex. 2; Rep. Tr. p. 10, lines 7 and 8]	13
Adjudication and order to file schedules, dated January 12, 1937	16
Order appointing H. F. Metcalf Trustee and fixing his bond, dated March 18, 1937	17
Order of Referee Utley approving bond of H. F. Metcalf as Trustee, dated March 19, 1937	26
Petition of H. F. Metcalf, Trustee, for order authorizing Trustee to employ F. P. Newport and fixing his salary, dated May 17, 1937 [Newport's Ex. 3; Rep. Tr. p. 13, line 26, to p. 14, line 3]	20
Order of Referee Utley authorizing Trustee to employ F. P. Newport and fixing his salary, dated May 17, 1937 [Newport's Ex. 4; Rep. Tr. p. 13, line 26, to p. 14, line 3]	27

Copy of letter of H. F. Metcalf, Trustee, to Mr. Newport, dated November 26, 1943, terminating Mr. Newport's services "beginning December 1, 1943" [Trustee's Ex. A; Rep. Tr. p. 31, lines 7-25; p. 34, line 7, to p. 44, line 9] 43

Said Exhibit A reads as follows:

"November 26, 1943

"Mr. F. P. Newport
Central Bldg.,
Los Angeles, California

"Dear Mr. Newport:

The writer has been studying our memoranda of available cash in the various accounts.

I have been discussing this also with Mr. Lynch and I do not know what to do regarding possibility of payment of future salary to you. You may therefore, accept this as a dismissal of your services beginning December 1, 1943.

Should you care to bring this up for review, it will be quite all right with the writer whatever disposition the Court sees fit to make of it.

Very sincerely yours,
H. F. METCALF Co.,
H. F. Metcalf."

HFM ahh

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Order affirming Order of Referee dismissing, with prejudice, petition of F. P. Newport for compensation for alleged services, dated December 27, 1955 95

Reporter's Transcript of hearing on September 19, 1955, before the Honorable Reuben G. Hunt, Referee in Bankruptcy, consisting of 119 pages not paged

Statement of the Case.

An involuntary petition in bankruptcy was filed against F. P. Newport Corporation, Ltd., a corporation, on March 19, 1935. On March 25, 1935, the Honorable Paul J. McCormick made an Order appointing H. F. Metcalf Receiver in Bankruptcy of the Estate. [R. p. 2.] The

assets of the corporation consisted almost exclusively of real property, most of it located in Los Angeles County.

F. P. Newport and his wife owned approximately 90% of the corporation's shares, and he had always dominated its policies. At the time the petition in bankruptcy was filed the corporation owed Security-First National Bank of Los Angeles over $1,351,000, secured by a deed of trust on most of its real property. There was also owing to Bank of America $50,000, secured by a trust deed, and there were unsecured claims of over $160,000. All the indebtedness was in default.

On November 21, 1935, the Receiver filed a petition for authority to employ Newport to assist him in his work [Newport's Ex. 1; Rep. Tr. p. 10, lines 7-8; R. p. 6]; and on that date Judge McCormick signed and filed an order authorizing the Receiver to employ Newport "to assist him in the handling of the properties of said estate" and directing the Receiver to pay Newport "a salary of $250 per month commencing with the 1st day of November, 1935, until the further order of this Court." [Newport's Ex. 2; Rep. Tr. p. 10, lines 7-8; R. p. 13.]

On January 12, 1937, F. P. Newport Corporation, Ltd., was adjudicated a bankrupt [R. p. 16] and the administration of the estate was referred to Ernest R. Utley, Referee. On March 18, 1937, Judge McCormick made an Order [R. p. 17] appointing H. F. Metcalf Trustee in Bankruptcy of the estate of F. P. Newport Corporation, Ltd., Bankrupt, and fixing his bond at $10,000. On March 19, 1937, Ernest R. Utley, Referee, to whom the case was referred, signed and filed an Order approving Metcalf's bond as Trustee. [R. p. 26.]

On May 17, 1937, H. F. Metcalf as Trustee in Bankruptcy filed a petition for an order [Newport's Ex. 3;

Rep. Tr. p. 13, line 26, to p. 14, line 3; R. p. 20] authorizing him as Trustee to employ F. P. Newport and fixing his salary. On May 17, 1937, Referee Utley signed and filed an Order [Newport's Ex. 4; Rep. Tr. p. 13, line 26, to p. 14, line 3; R. p. 27] authorizing the Trustee to employ Newport at a salary of $250 per month "to continue so long as said F. P. Newport shall be employed by said Trustee or until the further Order of this Court."

On November 26, 1943, H. F. Metcalf wrote a letter to Mr. Newport notifying him that he was dismissed "beginning December 1, 1943." [Trustee's Ex. A; Rep. Tr. p. 31, lines 7-25; p. 34, line 7, to p. 44, line 9.] See also copy of letter in List of Documents and in the Trustee's Objections to Newport's claim. [Rep. Tr. p. 3, line 23; p. 4, line 8; R. p. 43.] Mr. Newport received his salary from November 1, 1935, through November 30, 1943. [Findings of Fact, par. 12, p. 4, lines 25-27; R. p. 63.] Since then he has received no salary. He made no demand for compensation from December 1, 1943, until he filed the petition involved in this litigation on July 21, 1955. [Rep. Tr. p. 38, line 14, to p. 39, line 12; R. p. 29.]

Mr. Metcalf had a stroke in October, 1950, and an Order was made on November 2, 1950, removing him as Trustee. He died on May 23, 1951. It is significant that Mr. Newport did not assert a claim for over four years after Mr. Metcalf's death.

On November 23, 1942, in the case of *United States v. Metcalf* ((C. C. A. 9) 51 A. B. R. (N. S.) 727, 131 F. 2d 677) this Court decided that, because of certain activities of the Trustee, he was *operating* the business of the bankrupt. Consequently the Trustees, respectively, received double compensation as provided in Bankruptcy Act, Section 48c(2) (11 U. S. C. A., Sec. 76) until the filing of an Order in Liquidation on May 26, 1952.

Written objections to Mr. Newport's petition were filed by the Trustee [R. p. 43] by Bank of America National Trust and Savings Association [R. p. 59J] and by Wm. H. Neblett. [R. p. 59A.] The petition and the objections were heard before Referee Reuben G. Hunt on September 15, 1955. After Newport's Exhibits 1, 2, 3 and 4 and the Trustee's Exhibit A were introduced, counsel for the Trustee objected to the introduction of any further evidence, and moved the Court to dismiss the petition with prejudice on the grounds that the petition shows on its face that the Court is without authority to allow compensation to Mr. Newport on any allegations contained therein, and that there was no court authorization for his services except the two orders referred to above. [Rep. Tr. p. 30, line 15, to p. 31, line 6.]

The Referee sustained the objection and granted the motion. Findings of Fact, Conclusions of Law, and Order dismissing the petition with prejudice were signed and filed November 15, 1955. [R. p. 63.]

A petition for review of said Order was filed by Mr. Newport [R. p. 68] and one by his attorney Mr. Lavine. [R. p. 70.] The Referee filed a Certificate on Review [R. p. 72; see also Appendix hereto, p. 7] and a Supplemental Certificate. [R. p. 80.] The review was heard by Chief Judge, Hon. Leon R. Yankwich, on December 19, 1955. On December 23, 1955, Judge Yankwich filed his Memorandum Opinion on Review [R. p. 83; see also Appendix hereto, p. 15] affirming the order of the Referee of November 15, 1955 (*In re F. P. Newport Corp. Ltd.*, 137 Fed. Supp. 58), and on the same day signed and filed his "Decision on Review" wherein he adopted the Findings of the Referee (except as they related to the timeliness of the review—not an issue here) and affirmed the decision of the Referee. [R. p. 94; see also

Appendix hereto, p. 23.] A formal Order of Affirmance was signed and filed December 27, 1955. [R. p. 95; see also Appendix hereto, p. 24.]

On January 13, 1956, Newport filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. The Trustee in Bankruptcy filed a motion to dismiss the appeal. On March 2, 1956, the Court of Appeals made an order providing, among other things, as follows:

> "Appellee's motion to dismiss is denied.
>
> "The Court deems that the cause should be expedited. The appeal will be heard on the record as forwarded to the Clerk of this court without reproduction, and typewritten briefs are authorized. Time for briefs is shortened to 20 x 20 x 10 from this date.
>
> "On April 12, 1956, the Clerk, subject to approval of the Calendar Committee of this Court, will calendar the case for oral argument at an early date in Los Angeles or San Francisco. Until calendaring for oral argument on the merits, the cause will be retained by the Court as constituted to hear the motion to dismiss."

The appeal was argued before the Circuit Court on April 26, 1956. On June 5, 1956, the United States Court of Appeals filed its decision affirming the Order of the District Court sustaining the referee's disallowance of Newport's claim. (See *Newport v. Sampsell,* 233 F. 2d 944.) Petition for rehearing was denied by the United States Court of Appeals for the Ninth Circuit on July 6, 1956.

Mr. Newport's petition herein demonstrates his familiarity with the operations of the Trusteeship from the beginning, but especially from December 1, 1943. In fact he states [R. p. 29; par. XIII] that he continued

to operate all of the properties and was frequently referred to as "acting trustee." He knew Mr. Metcalf was collecting fees for the operation of the business, and he must have had in mind an intention to make the claim which he has made for $208,950 for fees and expenses. He knew that Mr. Metcalf was removed as Trustee on November 2, 1950, and that Paul W. Sampsell was elected Trustee in his place. Yet he concealed until July 21, 1955, his intention to make a claim for fees. He certainly was under a duty to disclose to Mr. Metcalf, to the Court, and to Mr. Sampsell when he took office the fact that he had such a claim and intended to assert it. Nowhere in his petition [R. p. 29] is there any hint of a disclosure of his intention to claim fees and expenses, prior to the filing of the petition on July 21, 1955.

Mr. Metcalf has been dead since May, 1951. He, and he alone, could have refuted Mr. Newport's sworn statement. The bankrupt estate, the Court, the creditors and Trustee Sampsell are all placed at a disadvantage by his conduct.

The Claim for Fees and Expenses.

The petition [R. p. 29], nine pages long, is full of arguments and self-serving declarations and incorrect statements. If one were to take it seriously, he would conclude that the whole burden of the administration of the estate rested on the shoulders of the petitioner; and that the fact that all the secured indebtedness of the estate has been liquidated, and an additional $407,000 accumulated was due solely to his efforts. An analysis of the petition follows:

Paragraph III contains an incorrect statement of the terms of the Order authorizing his employment. [R. p. 13.] The Order authorized his employment to assist the

Receiver in handling the properties of the estate, not for "handling of the properties of the estate." [R. p. 29, par. III.]

In Paragraph IV he states that he "rendered extraordinary services, for which it was understood and agreed that he would be paid the usual commissions and fees customarily paid in this community." The Order made no provision for "extraordinary services."

Paragraph V is simply a self-serving statement that he "continued his work" after he was discharged until the final sale.

In Paragraph VI he asks for salary at $250 per month from November 30, 1943, to May 3, 1954 (the date when the sale of the remaining assets was confirmed by the Referee) in the sum of $31,750, this being after his employment had been terminated.

In Paragraph VII he takes full credit for the payment to Security-First National Bank of Los Angeles of principal in the sum of $1,116,071.21, real property $222,-042.67, and interest of $356,198.53. These were services which the Trustees were required by law to perform, and for which they were paid.

Paragraphs VIII, IX and XI deal with his efforts to prevent the foreclosure of the Security-First National Bank's trust deed. Assuming that he did what he claims, the services were such as were required of him under the Bankruptcy Act, Section 7 (11 U. S. C. A., Sec. 25). Also, the Trustee is required to perform such services. (Bankruptcy Act, Sec. 47, 11 U. S. C. A., Sec. 75.) In Paragraph XI he asks $12,000 for this "service."

In Paragraph X Mr. Newport takes credit for the oil lease with the Universal Consolidated Oil Company. This lease was executed January 14, 1938, when Mr. Newport

was employed by the Trustee at a salary of $250 per month. However, he asks for compensation in the sum of $80,000.

In Paragraph XII Mr. Newport takes credit for certain concessions made by the City of Long Beach. These negotiations took place during the time the Trustee was attempting to obtain permits from Long Beach to drill the property. Newport was an employee of the Trustee at the time, on a salary.

In Paragraph XIII Mr. Newport claims that he was, in effect, Trustee from 1943 for the balance of Mr. Metcalf's life. The record in the case fails to substantiate his claim; but, on the contrary, demonstrates that Mr. Metcalf was in active charge as Trustee until October, 1950. Certainly, Mr. Newport made no report to the Court of any such circumstances.

In Paragraph XIV Newport deals with an attempted sale of certain real property to Procter & Gamble Manufacturing Company. Objections to the sale were filed by certain creditors and by the bankrupt. Newport did not file any objections. No sale took place. No assets were brought into the estate. (See 173 F. 2d 207.)

Paragraph XV deals with claimant's employing "appraisers and geologists." He claims a fee of $13,000 "20% of the benefits of the monies saved" plus $800 for expenses.

In Paragraph XVI he claims he sold real estate amounting to $429,000 and that his 5% commission is $21,450.

In Paragraph XVII he claims to have made a settlement with the "Sorensons," and for that he asks $3,000.

In Paragraph XVIII he deals with another mortgage for which he asks $25,000.

In Paragraph XIX he claims credit for an increase in the sale price of real property from $350,000 to $407,-000 and asks $5,000 for that service. The record in this Court proves that he opposed the sale or any sale.

In Paragraph XX he claims that, because he opposed a sale of real property, he accomplished a tax saving and for that he should receive $7,500.

In Paragraph XXI he claims credit for rental of his real estate office in the sum of $1,080.

His claim in Paragraph XXII sets out certain transactions with Bankline Oil Company in 1937 (while he was employed by the Trustee), and asks an indefinite sum calculated on 2% from oil and 5% from sale of real estate.

In Paragraph XXIII he claims to have "preserved the waterfront property" and for that he asks 10% of $191,-000 or $19,100.

In Paragraph XXIV he says he "redeveloped the La Crescenta property" and is "entitled to a reasonable sum for this work."

In Paragraph XXV he deals again (see pars. VIII, IX and XI) with attempts of Security-First National Bank to foreclose its trust deed, stating that he *alone* prevented the foreclosure and saved the estate. He asks to "be compensated accordingly." As a matter of fact, Mr. Newport never appeared in that litigation. F. P. Newport Corporation, Ltd. appeared and filed an objection to the petition for leave to foreclose. Likewise Bank of America National Trust and Savings Association filed an objection, as did the Trustee, H. F. Metcalf. The Referee made an Order restraining the sale for a limited period, and the foreclosure sale never occurred.

ARGUMENT.

We shall here discuss in their order the questions to be considered by the Court.

QUESTION 1.

Did the Order of Judge McCormick Dated November 21, 1935, Authorizing the Receiver to Employ Mr. Newport, Become Functus Officio Upon Appointment and Qualification of the Trustee on March 19, 1937?

Judge McCormick, himself, signed the order appointing H. F. Metcalf Trustee of the bankrupt estate and fixing his bond. [R. p. 17.] In that order, he recognized Ernest R. Utley as Referee, and provided that the Trustee's bond should be approved by the Referee. When Referee Utley signed the Order approving the Trustee's bond, the receivership was at an end. (11 U. S. C. A., Chap. 2, Sec. 11; Bankruptcy Act, Sec. 2, subd. 3.)

The order authorizing the Receiver to employ F. P. Newport [Rep. Tr. p. 10, lines 7 and 8; R. p. 13] provided that ". . . said Receiver is authorized and directed to pay said F. P. Newport a salary of $250 per month until the further order of this Court." When the Referee obeyed said Court order and qualified the Trustee, the Court terminated F. P. Newport's employment by the Receiver, for the simple reason that there was no longer a Receiver. Furthermore, if Newport continued to work for the Receiver, his duty would be to conserve the assets, whereas if he worked for the Trustee his duty would be to liquidate the assets. To simply state this proposition is to demonstrate its absurdity.

The Bankruptcy Act, Section 2a (11 U. S. C. A., Sec. 11) provides in part as follows:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may hereafter be held to . . .
>
> "(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified. . . ."

In 6 American Jurisprudence, Section 356, page 760, it is said:

> "Termination of Receivership.—The functions of a receiver in bankruptcy terminate in general upon a dismissal of the petition for the adjudication of the alleged bankrupt from which no appeal is taken, the vacation of the order for a receivership, or the appointment of a trustee in bankruptcy following an order of adjudication. The responsibility of the receiver for the assets in his custody, however, remains, following the appointment of a trustee until the trustee has qualified. In fact, a receiver is amenable to the court until he has accounted to and been discharged by the court."

In *Stanton v. Busch,* 59 F. 2d 668, 669 (C. C. A. 9, 1932), it is said:

> "A glance at section 11, title 11, U. S. C. A. makes it imperative that the order must be reversed. The court's jurisdiction and power is fixed and limited by the section to, '(3) appoint receivers, or

the marshals, upon application of parties in interest, in case the court finds it *absolutely necessary* for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed *or the trustee is qualified.*' (Italics supplied.)

* * * * * * * *

"It is sufficient to say that upon 'qualification of the trustee' (11 U. S. C. A., §11, *supra*) the receiver becomes *functus officio,* and the court had no power to make the order of reference, or any order other than to direct the ancillary receiver to file his account for acts done."

In Remington on Bankruptcy (5th Ed.), Volume 1, Section 350, page 507, it is stated:

"The functions of a receiver cease when a trustee is appointed, and a stay or injunction contained in the order appointing a receiver will likewise simultaneously terminate.

"Levin v. Barker, 122 F. 969, 47 A. B. R., N. S., 241 (1941, C. A. Mo.), cert. den. 315 U. S. 813, 86 L. ed. 1212, 62 S. Ct. 709, Gardner, Circuit Judge: 'Ordinarily the functions of a receiver appointed in bankruptcy proceedings cease with the appointment of a trustee. . . .' (Citing *Stanton v. Busch,* 59 F. 2d 668.)

See, also:

In re F. P. Newport Corporation, Ltd. (Yankwich, D. J.), 137 Fed. Supp. 58.

It is obvious from the plain language of the Bankruptcy Act and the above citations, that the order authorizing the employment of Newport by the receiver became *functus officio* on March 19, 1937, when the *Court* qualified the Trustee.

QUESTION 2.

Was F. P. Newport Entitled to Any Compensation in Excess of $250 Per Month for "Extraordinary" Services Claimed to Have Been Performed by Him Between November 1, 1935, When He Was First Employed, and November 30, 1943, the Date of His Discharge?

The Court's attention is called to the following Newport exhibits: Newport Exhibit 1 [Rep. Tr. p. 10, lines 7-8; R. p. 6]; Newport Exhibit 2 [Rep. Tr. p. 10, lines 7-8; R. p. 13]; Newport Exhibit 3 [Rep. Tr. p. 13, line 26, to p. 14, line 3; R. p. 20]; and Newport Exhibit 4 [Rep. Tr. p. 13, line 26, to p. 14, line 3; R. p. 27].

Exhibit 1 is the Receiver's petition for authority to employ Newport and fixing his salary. In it the Receiver states that Newport "desires to devote his entire time to aiding and assisting your petitioner until the affairs of the F. P. Newport Corporation, Ltd. are reorganized and rehabilitated to the satisfaction of all creditors." He also recommends that he be authorized to employ the said F. P. Newport upon a "full time basis."

Newport Exhibit 2 is the Order of Judge McCormick authorizing the Receiver to employ F. P. Newport and fixing his salary. It states that "H. F. Metcalf, Receiver herein, be and he is hereby authorized to employ F. P. Newport to assist him in the handling of the properties of said estate" and to pay him "a salary of $250.00 per month commencing with the 1st day of November, 1935, until the further order of this Court."

Newport Exhibit 3 is the petition of the Trustee for authority to employ F. P. Newport and fixing his salary.

In it the Trustee states that he "believes it would be for the best interests of this estate that he be permitted to employ said F. P. Newport *on a full time basis* at a salary of $250.00 per month." Said salary to "commence as of February 23, 1937, and *continue so long as said F. P. Newport shall continue in the employ of said Trustee,* or until the further Order of this Court." (Emphasis added.)

Newport Exhibit 4 is the Order of Referee Utley dated May 17, 1937, authorizing the Trustee to employ F. P. Newport and fixing his salary. In it the Trustee is

> "authorized to employ F. P. Newport as an assistant in the management and operation of the properties of the above named bankrupt and to pay said F. P. Newport for such services the sum of $250.00 per month, said salary to be paid out of the assets of said estate . . . said salary to be payable as of February 23, 1937, and to *continue so long as said F. P. Newport shall be employed by said Trustee* or until the further Order of this Court." (Emphasis added.)

On November 26, 1943, the Trustee wrote a letter to Mr. Newport [Trustee's Ex. A; Rep. Tr. p. 31, lines 7-25; p. 34, line 7, to p. 44, line 9; R. p. 43]:

"November 26, 1943

"Mr. F. P. Newport
Central Bldg.,
Los Angeles, California

Dear Mr. Newport:

The writer has been studying our memoranda of available cash in the various accounts.

I have been discussing this also with Mr. Lynch and I do not know what to do regarding possibility

of payment of future salary to you. You may therefore, accept this as a dismissal of your services beginning December 1, 1943.

Should you care to bring this up for review, it will be quite all right with the writer whatever disposition the Court sees fit to make of it.

Very sincerely yours,

H. F. METCALF Co.,

HFM ahh H. F. Metcalf."

The orders of November 21, 1935, and May 17, 1937, are the only orders ever made for his employment. He admits having been paid the salary provided by those orders, respectively, until November 30, 1943. He has received no salary since then.

In our opinion the two petitions and the two orders referred to above, are a complete answer to the claim of F. P. Newport for any fees or salary for his services from November 1, 1935, to November 30, 1943.

If Newport performed any services not covered by the said orders, they were not covered by any petition nor by any order. The rule governing services performed without an order of the Bankruptcy Court is discussed under Question 3.

QUESTION 3.

Was F. P. Newport Entitled to Any Compensation From the Bankrupt Estate for Services Claimed to Have Been Performed Subsequent to His Discharge by the Trustee on November 30, 1943?

The rule in bankruptcy is that compensation for services will not be allowed unless authority for employment is first obtained from the Court.

General Order in Bankruptcy No. 44;

General Order in Bankruptcy No. 45.

In *In re Loose,* 52 Fed. Supp. 20, 22-23, it is said:

> "It is well established that a court of bankruptcy in a strict sense, is a court of equity, the estate being a trust in the possession of persons completely under the control of the court in so far as they deal with the property subject to its jurisdiction. In such proceedings, as in a court of equity, the court speaks only through its orders or decrees, duly signed or entered . . ."

In *Beecher v. Leavenworth State Bank* (C. C. A. 9, 1950), 184 F. 2d 498, 501, it is said:

> "It has been repeatedly held that an attorney is not entitled to compensation unless there has been full compliance with General Order 44. Albers v. Dickinson, 8 Cir., 127 F. 2d 957, and cases there cited. Further, it appears that on May 23, 1945, the then district judge refused an allowance of $450 to the receiver's attorney for services rendered up to that time 'for the reason that the Receiver has not filed herein any Petition for the appointment of an attorney for said receiver.'

"The district court, in allowing the fee to the attorney for the receiver for the period prior to December 30, 1947, is reversed. He is entitled to fees only for such services after that date, the order then made being a valid compliance with Order 44."

In *In re Eureka Upholstering Co.,* 48 F. 2d 95-96, it is said:

"The forty-fourth General Order in Bankruptcy (11 U. S. C. A., §53) provides that no attorney shall be appointed for a receiver, except by order of court and upon petition of the receiver, supported by the proposed attorney's affidavit. . . . The order and the rule were passed to control serious abuses and are to be strictly observed; without an order of court upon full presentation of the relation of the proposed attorney with all other interests involved, not only may he not be retained, but he can recover nothing, no matter how beneficial, or how arduous, his services.

* * * * * * * *

"The receiver is responsible for the collection of the assets (*In re* Felson (D. C.), 139 F. 275, 280), and he alone can authorize any charges against them. If any creditor, petitioning or other, learns facts which lead him to suppose that property has been concealed, he may, and indeed he should, advise the receiver, and if the receiver prove slack, he may apply to the referee to stir him to action. The referee or the judge may then authorize the creditor to proceed, and he will be entitled to his reward under section 64b(2), but not otherwise."

In *Goldie v. Cox,* 130 F. 2d 690, 695, it is said:

"The Bankruptcy Act recognizes the necessity of assistance from the bankrupt to the trustee and credi-

tors in discovering and bringing into the estate all assets (11 U. S. C. A., §§25 and 44; Cameron v. United States, 231 U. S. 710, 717, 34 S. Ct. 244, 58 L. Ed. 448; Sparhawk v. Yerkes, 142 U. S. 1, 15, 12 S. Ct. 104, 35 L. Ed. 915) and such reasonable and ordinary services are due without compensation. Trustees v. Greenough, 105 U. S. 527, 537, 26 L. Ed. 1157, and see Crutcher v. Logan, 5 Cir., 102 F. 2d 612, 613; In re General Carpet Corporation, D. C. E. D. Pa., 38 F. Supp. 200, 203. It is only for extraordinary services—services in addition to and outside of those ordinarily necessary—that the bankrupt can secure compensation (In re Patterson-MacDonald Shipbuilding Co., 9 Cir., 288 F. 546), and then only when there is particular employment for such services. Crutcher v. Logan, 5 Cir., 102 F. 2d 612, 613. Where the bankrupt is a corporation, this same situation applies to officers and directors thereof. Crutcher v. Logan, 5 Cir., 102 F. 2d 612, 613."

See also:

In re Pedisich, 103 Fed. Supp. 199, 200;

In re Owl Drug Co., 16 Fed. Supp. 139, 148;

In re Joslyn, 224 F. 2d 223;

In re Lane Lumber Co., 206 Fed. 780, 788;

Cox v. Elliott, 122 F. 2d 851, 852.

QUESTION 4.

Were the "Extraordinary" Services Claimed to Have Been Performed by F. P. Newport Voluntary, Duplicate Services Which the Bankruptcy Act Requires the Trustee to Perform? Was He Entitled to Compensation for Any Such Services From the Bankrupt Estate?

Bankruptcy Act, Section 47(a) (11 U. S. C. A., Sec. 75), prescribes the duties of a trustee in bankruptcy in detail. The services set forth in the petition of Mr. Newport [R. p. 29] are the same services which the Trustees were required to and did perform, and for which they were paid. Nowhere in his petition does he claim that he demanded of the Trustee that he perform any of the duties set forth in said petition and that the Trustee refused to perform them. The services described by him were voluntary, duplicate services.

In Collier Bankruptcy Manual (2d Ed.), Section 62, page 706, it is said:

> "The duty of a receiver or trustee to render his services in person, or more exactly his duty, on principle, to assume personally the cost of any assistance he may deem desirable, in conjunction with his right, to the exclusion of any other person, to receive compensation for services assigned to him, is one important safeguard to secure economical administration. It is paralleled by another salutary requisite introduced by judicial orders and practice to an ever-increasing extent; namely of an application to the court for authority to hire such help as may exceptionally be needed to perform services requiring special professional or technical skill or knowledge. General Orders 44 and 45 provide for such previous authorization by the court in appointing attorneys, auctioneers, accountants and appraisers for the receiver or trustee. The judicial interpretation of these Orders is rigorous. (Citing *Matter*

of Eureka Upholstering Company (C. C. A. 2), 17 Am. B. R. (N. S.) 735, 48 F. 2d 95.)"

In *In re Owl Drug Co.*, 16 Fed. Supp. 139 at 148, it is said:

"And unpleasant though the task of rejecting claims of attorneys for services *actually* rendered in bankruptcy, when either *not* authorized or incurred *in violation* of the General Orders in Bankruptcy or of rules of court, may have been, at times, courts have performed it repeatedly and unhesitatingly. See Weil v. Neary (1929), 278 U. S. 160, 49 S. Ct. 144, 73 L. Ed. 243; In re G. W. Giannini, Inc. (D. C. N. Y., 1936), 14 F. Supp. 1005.

"One can readily see the wisdom of these rulings. Were the law otherwise, there would be no limit to the burden which might be placed upon an estate if attorneys for the bankrupt or individual creditors could, by doing work which *it is not* their duty to do, by assisting the trustee, without an order of court allowing their special employment, burden the estate with the added cost of performing work which it is *the duty* of others to perform. The bankruptcy court would lose control in the matter of fees. 'Volunteers' would be numberless. And it is almost certain that in every estate of *any* size, the courts would be confronted with claims for 'voluntary' assistance. Hence the practical wisdom of these rulings, sanctioned by our own Circuit Court, that the attorney for the bankrupt be not compensated for work which the bankrupt *is not* under legal obligation to do, but *which it is the duty of the receiver, trustee or their attorneys to perform.*"

See also:

In re New York Investors, 48 Fed. Supp. 900, 902-903;

In re Joslyn, 224 F. 2d 223 (June 23, 1955);

Whittla v. Nelson, 213 Fed. 587, 589-590.

QUESTION 5.

Is F. P. Newport Estopped by His Laches From Asserting Any Claim for Compensation and Expenses From the Bankrupt Estate?

F. P. Newport is the president and principal stockholder of the defunct, dissolved, bankrupt corporation. He had been employed first by the Receiver and then by the Trustee H. F. Metcalf from November 1, 1935, to November 30, 1943. As set forth in the Statement of Facts he claims to have been known as the "acting trustee" from December 1, 1943, to May 3, 1954. He now claims fees and commissions and reimbursement for expenses covering the whole period from November 1, 1935, on. Had he asserted a claim for extraordinary services for the period between November 1, 1935, and November 30, 1943, the Court, the then Trustee of the bankrupt estate and the creditors would have had the advantage of the Trustee's testimony to refute such claim. The same is true with regard to Mr. Newport's demand for fees and expenses from December 1, 1943, until the Trustee Metcalf became incapacitated in October, 1950, and Trustee Sampsell would have had the advantage of Mr. Metcalf's testimony. Death has closed the lips of Mr. Metcalf, and the conduct of Mr. Newport has rendered it exceedingly difficult, if not impossible, to refute his extravagant claims. Under the circumstances it is the position of Respondent that, in addition to all of the other reasons given in this brief for the dismissal of said petition with prejudice, the Trustee has a right to claim that Mr. Newport is estopped by his conduct to assert any claim for compensation or reimbursement at this late date.

In 19 American Jurisprudence, Estoppel, Section 42, pages 640-643, it is said:

"The doctrine of estoppel *in pais* is founded upon principles of morality and fair dealing and is intended to subserve the ends of justice. It always presupposes error on one side and fault or fraud upon the other and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. It concludes the truth in order to prevent fraud and falsehood and imposes silence on a party only when in conscience and honesty he should not be allowed to speak. Estoppel of this character arises from the conduct of a party, using the word 'conduct' in its broadest meaning as including his spoken words, his positive acts, and his silence when there is a duty to speak, and proceeds on the consideration that the author of a misfortune shall not himself escape the consequences and cast the burden on another. Accordingly, it holds a person to a representation made or a position assumed where otherwise inequitable consequences would result to another who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled to his injury.

"The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are:

(1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially."

Section 50, pages 650-652:

"Generally speaking a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action."

Section 55, pages 661-662:

"An estoppel may arise under certain circumstances from silence or inaction as well as from words or actions. Estoppel by silence or inaction is often referred to as estoppel by 'standing by,' and that phrase in this connection has almost lost its primary significance of actual presence or participation in the transaction and generally covers any silence where there are a knowledge and a duty to make a disclosure. The principle underlying such estoppels is embodied in the maxim 'one who is silent when he ought to speak will not be heard to speak when he ought to be silent.'"

Section 490, page 339:

"Suit to enforce an equitable claim or cause of action may be held to be barred by the complainant's laches or procrastination in the assertion of his right or equity, where the institution of suit has been delayed during an 'unreasonable' period of time. It is said that 'reasonable diligence' is essential to call into action the powers of a court of equity.

"'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. . . . Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.'"

In Restatement of Law, Restitution, Section 148, Laches and Statutes of Limitations, page 589, paragraphs (1) and (2), it is said:

"(1) In proceedings in equity, a person otherwise entitled to restitution is barred from recovery if he has failed to bring or, having brought has failed to prosecute, a suit for so long a time and under such circumstances that it would be inequitable to permit him now to prosecute the suit.

"(2) A cause of action for restitution may be barred by lapse of time because of the provisions of a statute of limitations."

Under comment on subsection (1), subdivision d, page 592, it is said:

"d. Chance of error. If the lapse of time has caused doubt as to the ascertainment of the facts, as where witnesses have died or papers have been lost, or where the time elapsed is so great that witnesses may have forgotten the facts, the chance that the respondent will be dealt with unjustly may be sufficiently great to prevent the granting of restitution."

In *Halstead v. Grinnan*, 152 U. S. 412, 38 L. Ed. 495, 496-497, it is said:

"Mr. Justice Brewer delivered the opinion of the court:

"The plaintiff, by this suit, invoked the aid of a court of equity to set aside a survey which had stood unchallenged for over twenty-five years. Such a long delay suggests laches, and a careful examination of the testimony satisfies us that the circuit court did not err in sustaining this defense. The defense itself is one which, wisely administered, is of great public utility, in that it prevents the breaking up of relations and situations long acquiesced in, and thus induces confidence in the stability of what is, and a willingness to improve property in possession; and at the same time it certainly works in furtherance of justice, for so strong is the desire of every man to have the full enjoyment of all that is his, that, when a party comes into court and asserts that he has been for many years the owner of certain rights, of whose existence he has had full knowledge and yet has never attempted to enforce them, there is a strong persuasion that, if all the facts were known, it would be found that his alleged rights either never existed, or had long since ceased. We have had before us lately several cases in which this defense has been presented, and in which the rules determining it have been fully stated and its value clearly demonstrated; *Hammond v. Hopkins*, 143 U. S. 224 (36:134), and cases cited in the opinion; *Felix v. Patrick*, 145 U. S. 317 (36:719); *Foster v. Mansfield, C. & L. M. R. Co.*, 146 U. S. 88 (36:899); *Johnston v. Standard Min. Co.*, 148 U. S. 360 (37:480). . . . And yet, as said by Mr. Justice Brown, speaking for the court in *Foster v. Mansfield, C. & L. M. R. Co., supra:* 'The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law

which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.'"

In *City of Glendale v. Coquat* (Ariz.), 52 P. 2d 1178, 102 A. L. R. 837, 840, it is said:

"Equitable estoppel may be defined as the effect of the voluntary conduct of a party, whereby he is absolutely precluded from asserting rights which might have otherwise existed as against another person who, in good faith, has relied upon such conduct and has been led thereby to change his position for the worse. The essential elements of estoppel are that plaintiff, with knowledge of the facts, must have asserted a particular right inconsistent with that asserted in the instant action, to the prejudice of another who has relied upon his first conduct. Moore v. Meyers, 31 Ariz. 347, 253 P. 626."

In *Thomasson v. Walker* (Va.), 190 S. E. 309, 110 A. L. R. 593, 598, it is said:

"In Moyers Coal Corporation v. Whited, 157 Va. 302, 160 S. E. 43, 46, this court adopted the rule of equitable estoppel as laid down in 4 Amer. & Eng. Decs. in Eq. 258, and followed in Chesapeake & Ohio R. Co. v. Walker, 100 Va. 69, 40 S. E. 633, 914:

"'The general rule of equitable estoppel or, as it is frequently called, estoppel *in pais*, is that when one person, by his statements, conduct, action, behavior, concealment, or even silence, has induced another, who has a right to rely upon those statements, etc., and who does rely upon them in good faith, to believe in the existence of the state of facts with which they are compatible, and act upon that belief,

the former will nott be allowed to assert, as again
the latter, the existtence of a different state of fac
from that indicatedl by his statements or conduct,
the latter has so ffar changed his position that h
would be injured tlhereby.' "

In *Deitrick v. Greaney* (Mass.), 309 U. S. 190-20
84 L. Ed. 694, 699, it iss said:

"It is a principlle of the widest application tha
equity will not permit one to rely on his own wrong
ful act, as against tthose affected by it but who hav
not participated in it, to support his own asserte
legal title or to defeat a remedy which except fo
his misconduct would not be available. See Unite
States v. Dunn, 268 U. S. 121, 133, 69 L. ed. 87
882, 45 S. Ct. 451l; Independent Coal & Coke Co
v. United States, 274 U. S. 640, 648, 71 L. ed. 127
1278, 47 S. Ct. 714."

The Court is also referred to the discussion of th
questions involved in tlhis appeal, contained in the Ref
eree's Certificate on Rewiew dated December 6, 1955 [R
p. 72; see also Appendix, p. 7] and to Chief Judg
Yankwich's Decision om Review [R. p. 94; see also Ap
pendix, p. 23] dated December 23, 1955, his Memo
randum Opinion on Review dated December 23, 195
[R. p. 83; see also Appendix, p. 15], and his Orde
Affirming the Order off the Referee dated December 27
1955. [R. p. 95; see also Appendix, p. 24.] Copies o
these documents are set forth in the Appendix attache
hereto.

QUESTION 6.

Is the Trustee in Bankruptcy Estopped From Asserting Any Claim for Compensation and Expenses From the Bankrupt Estate?

There is no basis for petitioner's claim that "the Trustee is estopped to deny the compensation for the services and must pay the reasonable value of the services to Mr. Newport."

In the first place, F. P. Newport during the whole administration of the estate until the final sale on May 3, 1954, was engaged, not in any effort on behalf of the Trustee, but in a scheme to impede and delay the liquidation of the estate in the vain hope of a reorganization of the bankrupt estate, using the creditors' assets, without contributing anything himself. In this connection the Court is referred to *In re F. P. Newport Corporation, Ltd.*, 123 Fed. Supp. 95, and *Newport v. Sampsell*, 216 F. 2d 344, and to the affidavit of Norman A. Bailie filed in support of the Trustee's Motion to Dismiss the appeal of F. P. Newport to the United States Court of Appeals for the Ninth Circuit in this very case.

But aside from the matters set forth in the preceding paragraph, there can be no estoppel against a Trustee in Bankruptcy.

In *Stanolind Oil & Gas Co. v. Logan*, 92 F. 2d 28, 31-32, it is said:

> "Appellants rely upon ratification by Isaacs as trustee and estoppel against him by his course of conduct. There was no express ratification by Isaacs

and no order of the bankruptcy court to that effect. Conceding for the sake of argument that Isaacs might be estopped as an individual dealing with his own property, as an officer of the court he was without capacity to do any act that would prejudice the estate under his administration or to waive the exclusive jurisdiction of the bankruptcy court. Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645; Whitney v. Wenman, 198 U. S. 539, 25 S. Ct. 778, 49 L. Ed. 1157; Lincoln Nat. Life Ins. Co. v. Seales (C. C. A.), 62 F. 2d 582."

See also Opinion of the United States Court of Appeals for the Ninth Circuit in *Newport v. Sampsell,* 233 F. 2d 944.

PETITIONER'S BRIEF.

Petitioner's Statement of the Case.

The petition has many statements of alleged facts which are not supported by the record. F. P. Newport was not instrumental in "bringing in any money" either to pay off the secured or the unsecured creditors. He opposed the settlement with the Security-First National Bank of Los Angeles both before the Referee and on review before the District Court. He opposed the order of liquidation of the estate. The bankrupt, through F. P. Newport and others opposed the sale of the assets "or any sale," through the Referee, the District Court, the United States Court of Appeals for the Ninth Circuit, on the rehearing before the Ninth Circuit, by petition for writ of certiorari before the Supreme Court, and by petition for rehearing before the Supreme Court. (*Newport v. Sampsell*, 216 F. 2d 344; cert. den. March 28, 1955; reh. den. May 9, 1955.)

The attitude of the bankrupt and of F. P. Newport, its president, received the attention of the Honorable Leon R. Yankwich, Chief Judge of United States District Court for the Southern District of California when the above matter was before him on review of the Referee's decision confirming the sale of the estate's assets. Judge Yankwich's memorandum opinion is reported in 123 Fed. Supp. 95. We quote from pages 96-98 of the opinion as follows:

> "The bankrupt and certain unsecured creditors seek to review an Order of the Referee dated May 3, 1954, confirming a sale of all the assets of the bankrupt, except certain cash, to R. T. Colter and Robbie E. Colter, his wife, as joint tenants for the sum of $407,000. Involved were 25 pieces of real property

and some personal property and interests in a leasehold, deed of trust and promissory notes. The estate has been in court for over nineteen years. It began as an involuntary proceeding filed on March 19, 1935. An adjudication was made on January 12, 1937. Throughout the proceedings, it has been the attitude of the bankrupt that, *if given long enough time,* its difficulties could be worked out.

"This review must be considered in the light of this attitude and against the background of a 'protracted' administration. —as the judge who handled it for many years characterized it. For it was the contention of the bankrupt at the conclusion of the hearing before the Referee on the Petition to Sell that, *at all times,* matters could have been worked out differently. But the Referee correctly stated:

> " 'A bankrupt case is a lot different than where the property is in private hands. If the man has property in his own hands not subject to legal process or creditors' claims, he can wait indefinitely. But a bankrupt estate can't. *It is the creditors' funds and they are entitled to get paid sometime.* The only question here is haven't we come to the end of the trail? *How much longer are we going to put the creditors off, how much longer are they going to be put off before they get their money? If I had any evidence before me to show that you could within a reasonably short time—any definite evidence—get a better buyer that would be an entirely different situation.* (Page 586) (Emphasis added.)'

"Significantly, the two most recent acts in the bankruptcy proceeding, which occurred before the present Order of Sale, were opposed *upon the same nebulous ground that, as the condition of the estate*

is improving, additional time might bring better results.

"So we find that when there came before the Court the question of compromising a claim of Security First National Bank of Los Angeles, one of its largest creditors, the Court delayed confirmation from April 30, 1951, to October 2, 1951, in the hope that a better offer or a different solution would be found. To the Order confirming the Compromise, dated October 22, 1951, the Honorable Paul J. McCormick, a Judge of this court of long experience, who, despite retirement, undertook the laborious task of continuing to act in this case, appended a statement to this effect:

> " 'It is to be observed that the court has since the submission of this review deferred decision for almost four months to accord all parties interested in this bankrupt estate to submit for consideration *a plan or method that is more beneficial and equitable to the estate than the compromise under review. None such has been presented or offered.'* (Emphasis added.)

"A similar situation arose when the Court was confronted with the review of an Order of the Referee, dated May 26, 1952, ordering liquidation. Bankruptcy Act, §2, sub. a(7), 11 U.S.C.A. §11, sub. a(7). Judge McCormick kept the matter under submission from July 24, 1952, to November 28, 1952. His Order confirming the Order of Liquidation, which has now become final, contained the following statement:

> " 'Although thoroughly argued by the respective parties on the hearing and it appearing at that time to be warranted by the record and files of this protracted bankruptcy proceeding, it was

believed by the Judge that if decision on the Referee's order of liquidation *were deferred for a reasonable period, some other lawfully-authorized equitable method of settlement would be forthcoming and duly proposed. Such other proceeding now seems to be unavailable.* (Emphasis added.)'

* * * * * * * *

"The contention that it is still possible to reorganize the corporation is illusory. No valid plan of reorganization has been proposed during the course of this long administration. And the Referee, having ordered liquidation on May 26, 1952, an Order which has been affirmed by this court, and *has become final,* this Court is not in a position, at the present time, to undo *the finality of that act* and start once more on the laborious process of attempting to reorganize the bankrupt estate after a nineteen years 'protracted' bankruptcy proceeding. The Referee found specifically that the objectors have not produced any substantial person willing to advance the moneys to liquidate the estate in any other manner and that the sale of all the assets was the only alternative."

The attitude and the activities of F. P. Newport throughout the twenty-one year history of this bankruptcy consisted of delay and obstruction, becoming more and more violent and frantic as the final liquidation of the assets approached. Chief Judge Yankwich's narration of Newport's obstructions could well be supported by many other instances of his interference with the Trustee—all a part of his delaying tactics. Further comment on petitioner's statement of the case is deemed unnecessary.

Petitioner's Questions.

Petitioner's questions, found on pages 13-31 of his brief are dealt with in the answers to Respondent's questions, as follows:

Petitioner's Questions	Petitioner's Brief—Page	Respondent's Questions	Respondent's Brief—Page
I	13	1	17
II	13	1	17
III	13	1	17
IV	13-14	2, 3, 4	20-27
V	14	6	35
VI	14	2, 3, 4	20-27

Repetition would only prolong this brief unnecessarily. We suggest, in addition, that if after November 30, 1943, Newport performed services for the Trustee with the latter's consent, and without an Order of Court authorizing his employment, his only claim, if he had any, would be a personal claim against the Trustee and not against the bankrupt estate. See Collier's Bankruptcy Manual (2nd ed.) Sec. 62, page 706 and cases cited, quoted at page 26 of this brief.

VII.

Petitioner's contention that the Referee erred in refusing to receive evidence is based on his false premise that Judge McCormick's order of November 21, 1935, continued to exist and be in force after the election and qualification of the Trustee (Respondent's question No. 1 and cases cited). In the absence of an order authorizing his employment, all the services detailed by petitioner (assuming without conceding that they were performed) could form no basis of a claim for compensation from the estate. It follows that the petition for compensation formed no basis for a claim against the estate, and that the Referee's

order excluding evidence and dismissing the petition with prejudice was proper, that it was within his jurisdiction, and that he did not abuse his discretion in making the order of dismissal. In fact, we think it was the only order which, under the circumstances, he could properly make.

VIII.

Petitioner's question VIII, "Whether the claims of Newport should have been heard by the District Court Judge and not the Referee," is answered by 11 U. S. C. A. Ch. 1, Sec. 1, subd. 10, Bankruptcy Act, Secs. 1, 10; and by 11 U. S. C. A. Ch. 4, Sec. 45, Bankruptcy Act, Sec. 22(a) and (b). Bankruptcy Act, Sec. 1(10) designates United States District Courts as courts of bankruptcy, and Bankruptcy Act, Sec. 22(a) and (b) provide that "the judge may at any stage of the proceeding * * * refer the same to a referee, either generally or specially." Section 22(b) authorizes the judge to transfer the case from one referee to another.

Petitioner's Argument.

We have examined the authorities cited by counsel for petitioner in support of the Petition for Writ of Certiorari. All except three were cited in his brief in the United States Court of Appeals for the Ninth Circuit. With the exception of *In Re Lustron Corporation,* 196 F. 2d 975, none have any bearing on fees in bankruptcy. The additional authorities cited by petitioner herein, namely, *L. A. Times-Mirror v. Superior Court,* 3 Cal. 2d 309, and *Imperial Assurance Co. v. Livingston* (8th Cir.), 49 F. 2d 745, 74 A. L. R. 1336, are in the same category. His reference to 14 Am. Jur. Sec. 74 fails to state the subject to which he refers.

Los Angeles Times-Mirror v. Superior Court, 3 Cal. 2d 309, involves a motion to exclude evidence. The Supreme Court of California held that because *some material substantial facts* were stated in the complaint, the motion should be denied. No material substantial facts are alleged in Newport's petition for fees and expenses.

Imperial Assurance Co. v. Livingston, 49 F. 2d 745, 74 A. L. R. 1336 is a bankruptcy case. A receiver in bankruptcy, who had charge of the assets, took out an insurance policy on a building after the trustee was elected and qualified, but before the trustee had taken possession. The building was destroyed by fire; and the insurance company claimed the policy was void because the receiver had no insurable interest after the qualification of the trustee. The Court held that "until the custody is actually out of the receiver, he has the power to protect such property by insurance."

In re Lustron Corporation, 196 F. 2d 975 was a case involving three petitions for attorneys' fees. The petitioners were (1) attorneys for the petitioning creditors, (2) special counsel for the trustees appointed by the Court, and (3) attorneys for the bankrupt. It has no bearing on this case. It deals with a special statute (Bankruptcy Act, Sec. 64a, subd. (1), 11 U. S. C. A., Sec. 104) authorizing the Court to allow reasonable attorneys' fees to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases. Two of the petitioners are covered by the statute. The third petitioner—special counsel for the trustees—was covered by an Order of Court under General Order 44.

Petitioner has cited neither statute nor decision which supports his contentions and we have found none.

Petitioner bases his claim to compensation on three false premises, namely:

1. That the Order of Judge McCormick continued to exist after the election and qualification of the Trustee in bankruptcy, and that F. P. Newport was still employed pursuant to said Order until the assets were sold.
2. That the services performed by F. P. Newport, as detailed in his petition, were beneficial to the estate, and should be compensated irrespective of any order.
3. That the services alleged to have been performed by him during the time he was employed by the Trustee, and prior to his discharge by the Trustee, were not fully compensated for by monthly salary paid to him by the Trustee.

Petitioner completely ignores the provisions of the Bankruptcy Act and the purpose of the law. His conduct throughout the twenty-one years demonstrates his idea that bankruptcy was "tailor made" for his benefit, namely: To hold his creditors in check, no matter how long, until something "turned up" to enable him to reorganize his corporation, at the expense of the creditors, and to his own financial advantage. The very claim he filed is ample proof of his scheme. The Court is also referred to the answers to Respondent's questions 1, 2, 3 and 4 on pages 17 to 27 hereof, respectively.

Conclusion.

In conclusion we submit that petitioner states neither facts nor law to provide any important reason, nor in fact any reason for the Supreme Court to grant his petition for writ of certiorari (Rule 19 of the Supreme Court).

His petition for writ of certiorari, like his petition for review of the Referee's order, his appeal to the United States Court of Appeals for the Ninth Circuit, and his petition for rehearing before said Court, is based on the erroneous theories (a) that an order of a District Court authorizing a receiver in bankruptcy to hire an assistant, lives on after the election and qualification of a Trustee in bankruptcy, and (b) that petitioner is entitled to compensation from the estate for "extraordinary" services he claims to have performed, both while employed by the Receiver and Trustee, respectively, and after his discharge by the Trustee, without any order of court authorizing his employment. Both theories have been shown to be false, and opposed to the provisions of the Bankruptcy Act and the uniform decisions of the court.

We respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BAILIE, TURNER, LAKE & SPRAGUE,
By NORMAN A. BAILIE,
NORMAN A. BAILIE and
RICHARD A. TURNER
Attorneys for Respondent, Paul W. Sampsell, as Trustee.

APPENDIX.

Findings of Fact, Conclusions of Law, and Order Dismissing Claims of F. P. Newport for Fees.

In the District Court of the United States, Southern District of California, Central Division.

In the Matter of F. P. Newport Corporation, Ltd., a corporation, Bankrupt. In Bankruptcy No. 25308-Y.

F. P. Newport having filed herein his verified petition for an allowance of compensation for services alleged to have been performed by him for the benefit of the estate of F. P. Newport Corporation Ltd., a corporation, bankrupt, and written objections to said petition having been filed by Paul W. Sampsell, Trustee herein, by Bank of America National Trust and Savings Association and by Wm. H. Neblett, Esq., unsecured creditors of said bankrupt, and the matter having come on regularly to be heard on September 19, 1955, at 10 o'clock a.m. before the Honorable Reuben G. Hunt, Referee, pursuant to notice to creditors duly given according to law; petitioner appearing in person and by his counsel Morris Lavine, Esq.; the trustee appearing by his counsel Bailie, Turner, Lake & Sprague by Norman A. Bailie, Esq.; Bank of America National Trust and Savings Association appearing by its counsel Edmund Nelson, Esq. and Winfield Jones, Esq.; and certain evidence both oral and documentary having been introduced on the part of the petitioner, and on the part of the objectors; and counsel for objectors having objected to the introduction of further evidence in support of said petition of F. P. Newport for compensation for extraordinary services, on the ground that said petition on its face shows that the Court is without authority to allow petitioner any compensation on any ground set forth

in said petition; and said objectors having moved the Court on the same ground to dismiss said petition with prejudice; and the Court having heard the arguments of counsel for petitioner and of counsel for objectors, and having examined the authorities cited by said counsel, and having made an independent examination of authorities bearing on the subjects, and having taken judicial notice of the record in this proceeding, and being fully advised in the premises, and having sustained the objections of counsel for objectors, and having granted the motion of counsel for objectors to dismiss said petition with prejudice, now makes and files his FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER as follows:

FINDINGS OF FACT.

1. F. P. Newport Corporation, Ltd. was a corporation organized pursuant to the laws of the State of Delaware. F. P. Newport was a director and President of said corporation; he and his wife Letitia Newport own approximately 90% of the issued and outstanding shares of said corporation.

2. An involuntary petition in bankruptcy was filed against said F. P. Newport Corporation Ltd. on March 19, 1935, and on March 25, 1935, the Honorable Paul J. McCormick, Judge of the above entitled Court, made and filed his Order appointing H. F. Metcalf Receiver of the estate of said alleged bankrupt, and said Metcalf qualified as such Receiver and continued to act as such Receiver until his election and qualification as Trustee in Bankruptcy as hereinafter set forth.

3. On November 21, 1935, the Honorable Paul J. McCormick made and filed his Order authorizing said Receiver to employ said Newport to assist him in the

handling of the properties of the bankrupt estate and directed said Receiver to pay him a salary of $250 per month commencing November 1, 1935, until the further Order of the Court. The said $250 per month covered all services rendered by Newport to the Receiver.

4. Said Newport entered upon the discharge of his duties pursuant to said Order, and continued to be employed by said Receiver until the election and qualification of the Trustee herein H. F. Metcalf, on March 19, 1937, who thereupon succeeded the Receiver in office and the latter was thereupon discharged.

5. On May 17, 1937, Ernest R. Utley, Referee herein, made and filed an Order authorizing the Trustee H. F. Metcalf to employ said Newport as an assistant in the management and operation of the properties of said bankrupt at a salary of $250 per month, said salary to be payable as of February 23, 1937, and to continue as long as said Newport should be employed by said Trustee or until the further order of the Court.

6. Said Newport was employed by said Receiver from November 1, 1935, to February 23, 1937, and he was fully paid by the Receiver for all services performed by him as such employee of said Receiver, and at the rate provided for in said Order of November 21, 1935.

7. Said Newport was employed by said Trustee from February 23, 1937, to November 30, 1943, and he was fully paid by the Trustee for all services performed by him as such employee of said Trustee, and at the rate provided for in said Order of May 17, 1937.

8. On November 26, 1943, the Trustee H. F. Metcalf notified said Newport in writing that he was dismissed as of December 1, 1943. Said Newport received said written

notification by United States mail on or about November 26, 1943.

9. No payments of salary were made to said Newport after the payment of salary for the month of November, 1943, and said Newport made no demand on the Trustee for further salary.

10. No order of Court was made for the employment of said Newport except the Orders referred to in paragraphs 3 and 5 of these Findings.

11. The alleged extraordinary services set forth in F. P. Newport's petition herein detail services which it was the duty of the Receiver and of the Trustee, respectively, to perform, which petitioner was under no duty to perform, and which if performed by him were volunteer services for which the Bankruptcy Act does not permit any payment.

12. The Court finds, in taking judicial notice of its own records in this case, as follows from such records: The report filed by the Trustee in Bankruptcy Sampsell on June 3, 1955, shows a final balance of cash on hand, available for final distribution, for expenses of administration and dividends to unsecured creditors, both prior and general, of $414,314.79. Tax claims filed as expenses of administration and unpaid amount to $132,300.94, all of which are in litigation. L. M. Cahill, the attorney for the bankrupt corporation, in addition to the $10,500.00 paid him on account, has filed a claim for further compensation in the sum of $34,500.00, which claim is still pending undetermined. Since the filing of the said account, the Trustee has paid, upon the order of the Court $750.00 for allowed priority labor claims, $471.25 for priority tax claims, and $15,000.00 on account for services of the coun-

sel for the Trustee in Bankruptcy. The total amount of general allowed claims is $185,705.59, upon which has been paid a first dividend of 25% amounting to $46,426.40. F. P. Newport has been paid $25,466.62 as salary for services to the estate, $5,147.40 for auto mileage, and $825.00 for services as a realtor. The petition filed on July 21, 1955, by Mr. Newport for fees requests the allowance of some $127,100.00 for services and $34,400.00 for expenses, in addition to these amounts previously paid.

Conclusions of Law.

From the foregoing Findings the Court concludes:

I.

That neither the petition for fees nor the evidence presented shows any right of petitioner to any recovery of fees from the Estate.

II.

That the objection to the introduction of evidence herein should be sustained.

III.

That the motion of objectors to dismiss with prejudice F. P. Newport's petition for fees herein should be granted.

Order.

It Is Hereby Ordered that the claim of F. P. Newport for fees be and it is hereby dismissed with prejudice.

Dated the 15th day of November, 1955.

Reuben G. Hunt,
Referee in Bankruptcy.

Received copy of above FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER the 8th day of November, 1955.

MORRIS LAVINE,
By V. TAFT,
(Morris Lavine)

ABOVE FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER ARE HEREBY APPROVED

Dated: November 7, 1955

EDMUND NELSON and WINIFIELD JONES
By s/ Winfield Jones
Attorneys for BANK OF AMERICA, etc. (Objector)

(Wm. H. Neblett) (Objector)

BAILIE, TURNER, LAKE & SPRAGUE
By Norman A. Bailie
(Norman A. Bailie)
Attorney for Paul W. Sampsell,
Trustee in Bankruptcy

Received copy of above FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER the 8 day of November, 1955

s/ Wm. H. Neblett (Objector)

In the District Court of the United States, Southern District of California, Central Division.

In the Matter of F. P. Newport Corporation, Ltd., a corporation, Bankrupt. No. 25,308-Y.

Certificate of Referee on Reviews of His Order Dismissing the Petition of F. P. Newport for Fees.

This is an involuntary proceeding in bankruptcy, commenced on March 19, 1935. Thereafter H. F. Metcalf was appointed and qualified as Receiver in Bankruptcy of the estate. An adjudication in bankruptcy was made on Jan. 12, 1937, and the case referred for administration to Ernest R. Utley, then a Referee in Bankruptcy of this Court. The said H. F. Metcalf acted as Receiver in Bankruptcy until Feb. 25, 1937, when Hubert F. Laugharn was appointed and qualified as Trustee in Bankruptcy. Thereafter, and on Mar. 18, 1937, former Judge Paul J. McCormick of this Court disaffirmed and set aside the order appointing Hubert F. Laugharn, as Trustee in Bankruptcy, and appointed H. F. Metcalf as Trustee in Bankruptcy in his place and stead. Thereafter, H. F. Metcalf acted as such Trustee in Bankruptcy until Nov. 20, 1950, when Paul W. Sampsell was appointed Trustee in Bankruptcy in his place and stead and qualified as such on Nov. 21, 1950. Since that time the said Paul W. Sampsell has been the duly appointed, qualified and acting Trustee in Bankruptcy of the estate.

On Nov. 21, 1935, Judge McCormick authorized the said H. F. Metcalf, as such Receiver in Bankruptcy, to employ F. P. Newport to assist him in handling the properties of said estate and to pay said Newport a salary of $250.00 per month commencing with the first day of November, 1935, until the further order of this court.